(21,395.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 89.

SIMEON HALLOWELL

vs.

THE UNITED STATES.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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1 United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1908.

No. 2489.

SIMEON HALLOWELL, Plaintiff in Error,
v.
THE UNITED STATES OF AMERICA, Defendant in Error.

The United States Circuit Court of Appeals for the Eighth Circuit, sitting in the City of St. Paul, Minnesota, on the 17th day of July, A. D. 1908, certifies that the record in the above entitled cause which is pending in such court upon a writ of error to review a judgment of conviction rendered against the plaintiff in error in the District Court of the United States for the District of Nebraska, discloses the following:

The indictment was returned November 16, 1905, and charged that the defendant, on August 1, 1905, in the District of Nebraska, introduced whiskey and other intoxicating liquors into a designated portion of the Indian country, in violation of the act of January 30, 1897 (29 Stat., ch. 109, p. 506). The defendant entered a plea of not guilty and the case was submitted to a jury upon the following agreed statement:

2 "That the defendant, Simeon Hallowell, an Omaha Indian, is and was on the first day of August, 1905, an allottee of land granted to him on the Omaha Indian Reservation, in Thurston County, Nebraska; that the allotment so made to him was made under the provisions of the Act of Congress of August 7, 1882 (22 Statutes at Large, 341); that the first or trust patent was issued to him in the year 1884, and that the twenty-five year period of the trust limitation has not yet expired; and that the fee title of the allotment so made to him is still held by the United States.

"That the defendant, Simeon Hallowell, on the first day of August, 1905, procured at a point outside the said reservation one-half gallon of whiskey which he took to his home, which was within the limits of the Omaha Indian Reservation, and upon an allotment which he had inherited and which allotment was made under the provisions of the act of Congress, of August 7, 1882, and the title of which is held by the Government, as the twenty-five year trust period has not expired. That he took the said whiskey into and upon this allotment for the purpose of drinking and using the same himself, and that he did drink said whiskey and did give some of it to his friends or visitors to drink.

"That the said Omaha Indian Reservation has been allotted practically in whole and that many of the allotments of deceased Omaha Indians have been sold to white people, under the provisions of the Act of Congress of May 27, 1902 (32 Statutes at Large, 245, 275); that within the original boundary limits of the Omaha

Indian Reservation, there are many tracts of land that have been sold, under the provisions of said act, to white persons who are the sole owners thereof, and that the full title to such lands has passed to the purchaser, the same as if a final patent without restriction upon alienation had been issued to the allottee.

"That all of the Omaha Indians who were living in the year 1884, and by law entitled to allotments, received them.

"That the Omaha Indian Reservation is within and a physical part of the organized territory of the State of Nebraska, as are also the allotments herein referred to, into and upon which the said defendant took said whiskey. That the Omaha Indians exercise the rights of citizenship, and participate in the County and State Government extending over said Omaha Indian Reservation, and over and upon the allotments herein referred to. That the defendant, Simeon Hallowell, has been on frequent occasions a Judge and Clerk of election, a Justice of the Peace, an Assessor, and a Director of the public school district in which he lives. That Omaha Indians have taken part in the State and County government, extending over the reservation, and have held the following offices in said county of Thurston, State of Nebraska: County Coroner, County Attorney, County Judge, Justice of the Peace, Constable, Road Overseer, Election officers, and have also served as jurors in the county and district Courts. Defendant is self-supporting as are most of said Indians. Some of them are engaged in business and most of them engaged in farming."

3 Over the defendant's objection that the matters recited in the agreed statement did not constitute or show an offense against the laws of the United States, the court instructed the jury that, if the matters so recited were true, the defendant was guilty of the offense charged. The defendant reserved an exception to this ruling. The jury found him guilty and judgment was thereupon pronounced against him.

And the Circuit Court of Appeals for the Eighth Circuit further certifies that the following question of law is presented to it in said cause, that a decision thereof is indispensable to the proper determination and disposition of the cause, and that to the end that the cause may be properly determined and disposed of, such court desires the instruction of the Supreme Court of the United States upon such question, to wit:

When, under the act of August 7, 1882 (22 Stat. 341), an allotment in severalty has been made to a tribal Indian out of lands in a tribal reservation in the State of Nebraska and a trust patent therefor has been issued to the allottee, and when the provisions of section 7 of the said act of August 7, 1882, and of section 6 of the act of February 8, 1887 (24 Stat. 388) have become effective as to such allottee, does the fact that the United States holds the land so allotted in trust for the allottee, or, in case of his decease, for his heirs, as provided in section 6 of the said act of August 7, 1882, enable, authorize or permit the United States to regulate or prohibit the introduction of intoxicating liquors upon such allotment during

the limited period for which the land so allotted is so held in trust by the United States?

WALTER H. SANBORN,
WILLIS VAN DEVANTER,
JNO. F. PHILIPS,
Judges of the United States Circuit Court of Appeals for the Eighth Circuit.

4 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing certificate in the case of Simeon Hallowell, Plaintiff in Error, vs. The United States of America, No. 2489, May Term, 1908, was duly filed and entered of record in my office by order of said Court, and as directed by said Court, the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, this twentieth day of July, A. D. 1908.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

[Endorsed:] U. S. Circuit Court of Appeals, Eighth Circuit. May Term, 1908. No. 2489. Simeon Hallowell, Plaintiff in Error, vs. United States of America. Certificate of Question to the Supreme Court of the United States. Filed Jul- 20, 1908. John D. Jordan, Clerk.

Endorsed on cover: File No. 21,395. U. S. Circuit Court of Appeals, 8th Circuit. Term No. 89. Simeon Hallowell vs. The United States. (Certificate.) Filed November 2d, 1908. File No 21,395.

Supreme Court of the United States

OCTOBER TERM, 1910.

SIMEON HALLOWELL,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.
} No. 89.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF CASE.

The record shows that one Simeon Hallowell, an Omaha Indian allottee, was indicted at the November, 1905, Term of the United States Court for the District of Nebraska for introducing liquor into the Indian Country, to wit: the Omaha Indian Reservation in Thurston County, Nebraska. That the said indictment is based upon the authority of the Act of Congress of January 30, 1897, 29 U. S. Sts. at L., page 509.

That the defendant was allotted land upon the Omaha Indian Reservation in Thurston County, Nebraska, under the provisions of the Act of Congress of August 7, 1882, 22 U. S. Sts., 341.

That the defendant procured liquor outside the original boundary limits of the Omaha Indian Reservation which he took upon the said Reservation, upon an allotment which had come to him by inheritance, and to which the trust title had not expired. That he drank some of it himself and gave some to his friends and visitors to drink.

The evidence shows that the whole of said Reservation has been allotted, and some tracts of land within the original boundary limits of said Reservation have been sold and title passed to white people. That the said Reservation is within and a part of the organized County of the State of Nebraska and that the Omaha Indians participate in the local county government, are voters, hold office, and that defendant has held various offices in said county organization as election officer, school officer, judge of election and justice of the peace. That the defendant has been a citizen of the United States and the State of Nebraska since the 29th day of December, 1884, and the complete jurisdiction of the State courts has been in force over said Reservation since said date. That practically all the Omaha Indians have been allotted. That in County affairs Indians have held the offices of County Judge, County Attorney, County Surveyor, County Commissioner, School Officers, Justices of the Peace, Constables, Road Overseers, and election officers, and jurors in the County and District Courts.

Plaintiff in Error was convicted and sentenced to pay a fine of $100 and costs of prosecution, and to be imprisoned in the county jail for sixty days, and until said fine and costs were paid.

ASSIGNMENTS OF ERROR.

1. That the acts charged against this defendant in the indictment found against him do not constitute a crime against the laws and authority of the United States.

2. That the Omaha Reservation, Omaha Indian Reservation in Thurston County, Nebraska, as charged in the indictment is not a place within the exclusive jurisdiction of the United States.

3. That the Court erred in giving the instruction as follows: "I assume the responsibility of saying to you that if the facts as agreed upon are true, such facts would constitute a violation of the law and the defendant would be guilty of the offense charged."

4. That the verdict, judgment and sentence are contrary to law.

5. That the Court is without jurisdiction of the offense charged in the indictment.

ARGUMENT.

It is claimed by the defendant that the territory referred to as the Omaha Indian Reservation in Thurston County, Nebraska, is within the sole and exclusive police power and jurisdiction of the State of Nebraska. That the United States of America did not when the State of Nebraska was admitted into the Union, reserve any police power or jurisdiction of the territory in question, and the State of Nebraska has not granted to the United States any such jurisdiction.

That the enabling act to the people of the Territory of Nebraska was passed on April 19, 1864, and is found in Volume 13, U. S. Statutes at Large, 47. The act was passed prior to the treaty of March 6, 1865. In reference to this territory the Supreme Court of the State of Nebraska has said as follows:

> "Now it is only within those particular places mentioned in the sixteenth subdivision of section eight, article one, of the Federal Constitution, that Congress can provide general police regulations for the government of the people. All other places are within the exclusive control of the State government, to whose legislation we must look for the punishment of all ordinary crimes and misdemeanors. From this it would seem clear that at the date of our admission into the Union, every portion of the territory within the prescribed boundaries of the State, the Indian Reservations included, became subject to its laws, and that for the punishment of all ordinary crimes, such as that under consideration, resort could alone be had to State laws, administered by State courts."
>
> Painter vs. Ives, 4 Nebraska, 128.

The same conclusion was reached in the case of *ex parte* Sloan, in which the Court said:

> "After a State has been admitted into the Union, the fact that within its boundaries land, the fee of which is in the United States, is set apart for an Indian Reservation is not enough of itself to give the United States Court jurisdiction to try a person for murder committed within the limits of such reservation."
>
> 4 Sawyer, 330.

The effect given an enabling act as to the jurisdiction of the United States Courts over offenses committed on an Indian Reservation as it might be limited by a disclaimer

of right to such lands is fully discussed in the case Draper vs. United States, 164 U. S., 244, where the Court says:

> "As equality of statehood is the rule, the words relied on here to create an exception cannot be construed as doing so, if, by any reasonable meaning, they can be otherwise treated. The mere reservation of jurisdiction and control by the United States of 'Indian Lands' does not of necessity signify a retention of jurisdiction in the United States to punish all offenses on such lands by others than Indians or against Indians."

This case approves the decision of United States vs. McBranty, 104 U. S., 622, from which the Court uses the following statement:

> "Whenever, upon the admission of a State into the Union Congress has intended to except out of it an Indian Reservation, it has done so by express words."

There is no exception in the enabling act admitting the State of Nebraska and the language is much broader than that of the Montana enabling act.

The Indians within the Omaha Reservation of Thurston County, Nebraska, being allottees, they are, therefore, citizens, and no question can arise under that part of the Act of January 30, 1897, as to selling or giving liquor to Indians. The question is wholly as to the police power or jurisdiction of the United States over the said Reservation. The question is materially answered by this Court in the case of *In re* Heff, wherein it is said:

> "Now the act of 1897 is not a revenue statute, but plainly a police regulation. It will not be doubted that an act of Congress attempting as a police regulation to punish the sale of liquor by one citizen of a State to

> another within the territorial limits of that State would be an invasion of the State's jurisdiction and could not be sustained, and it would be immaterial what the antecedent status of either buyer or seller was. There is in these police matters no such thing as a divided sovereignty. Jurisdiction is vested entirely in either the State or Nation and not divided between the two."
> *In re* Heff, 197 U. S., 489.

The act then is a police regulation and there is no divided sovereignty. This Court further cites and approves the case of the United States vs. Dewitt, 9 Wall., 41, and quotes therefrom as follows:

> "As a police regulation, relating exclusively to the internal trade of the States, it can only have effect where the legislative authority of Congress excludes, territorially, all State legislation, as, for example, in the District of Columbia. Within State limits, it can have no constitutional operation."

That the said Omaha Indians to which tribe the defendant belongs have been the objects of special legislation as to their allotments and personal status. They were allotted under the provision of the Act of Congress of August 7, 1882, 22 U. S. Stats., 341, Section 7 of which is as follows:

> "Sec. 7. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of said tribe of Indians shall have the benefit of and be subject to the laws, both civil and criminal, of the State of Nebraska; and said State shall not pass any law denying any Indian of said tribe the equal protection of the law."

This act of Congress gave the individual Indian of the Omaha Tribe of Indians the same rights and immunities as any other citizen. It granted to him his land, and with

it and over it the benefit of the laws both civil and criminal of the State of Nebraska.

The Indian then who is a voter, citizen and wholly released from Federal wardship, and subject to only the laws of the State of which he is a resident and a citizen should not be deprived of his liberty by laws that invade the State's jurisdiction. The County of Thurston, within which the Reservation lies, was organized in the year 1889, see Cobbey's Annotated Statutes, page 1518. The Indians were allotted lands, and patents issued to them in 1884, and the Act under which plaintiff in error was convicted was not passed until January 30, 1897. The enabling act, the allotments, and the organization of the County were all legal acts long prior to the act under which plaintiff in error was prosecuted, and convicted. The said act of January 30, 1897, is subsequent to all these rights of the State, the County, and the allottee.

The latest judicial announcement as to the introducing liquor into, so-called, Indian Country, is as follows:

> "The police power of the United States can only be exercised where the legislative authority of Congress excludes territorially all State legislation, and where the United States has conveyed under its land laws lands within a State ceded to it by an Indian tribe, and such lands have passed into the ownership of individuals and a municipality of the State which has been formed thereon, they are no longer subject to the provisions of Rev. St., Sec. 2139, as amended by Act Jan. 30, 1897, c. 109, 29 Stat., 506, making it an offense to introduce liquor into the Indian country; nor can that law be retained in force over such lands by agreement with the Indians in the contract or treaty of cession, the police power of the State to regulate the sale of liquor thereon being exclusive."
>
> *In re* Dick, 141 Fed., 5.

The liquor traffic is under the control and regulation of State laws. The State of Nebraska has provided punishment for the violation of its liquor laws, and the Indian citizen the same as other citizens, should be subject to only one sovereign jurisdiction and power.

The Act of Congress of January 30, 1897, in one complete act declares against the sale of liquor to Indians, and against the introducing of liquor into the Indian Country. It is the same as the laws preceding it, except that it enlarges the said acts by definition. With the exceptions named it is the identical statute as Section 2139 of the Revised Statutes, and the Act of Congress of March 15, 1864.

Chap. XXXIII. An Act to Amend an Act, Entitled "An Act to Regulate Trade and Intercourse with Indian Tribes, and to Preserve Peace on the Frontiers," Approved June 30, 1834.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That the twentieth section of the act "Act to Regulate Trade and Intercourse with Indian Tribes and to Preserve Peace on the Frontiers," approved June 30, 1834, be, and the same is hereby, amended so as to read as follows, to wit: "Sec. 20. And be it further enacted, That if any person shall sell, exchange, give, bargain, or dispose of any spirituous liquors or wine to any Indian under the charge of any Indian Superintendent or Indian Agent appointed by the United States, or shall introduce or attempt to introduce any spirituous liquor or wine into the Indian country, such person on conviction thereof, before the proper District or Circuit Court of the United States, shall be imprisoned for the period not exceeding two years, and shall be fined not more than three hundred dollars: *Provided,* however, that it shall be a sufficient defence to any charge of introducing or attempting to introduce liquor into the Indian country if it be proved

to be done by order of the War Department, or any officer duly authorized thereunto by the War Department. And if any Superintendent of Indian Affairs, Indian Agent, or Sub-agent, or Commanding Officer of the Military Post, has reason to suspect or is informed that any white person or Indian is about to introduce or has introduced any spirituous liquor or wine into the Indian country in violation of law, it shall be lawful for such Superintendent, agent, sub-agent, or commanding officer, to cause the boats, stores, packages, wagons, sleds, and places of deposit of such persons to be searched; and if any such liquor be found therein, the same, together with the boats, teams, wagons, and sleds used in conveying the same, and also the goods, packages, and peltries of such persons shall be seized and delivered to the proper officer, and shall be proceeded against, by libel in the proper court, and forfeited, one-half to the informer and the other half to the use of the United States; and if such person be a trader, his license shall be revoked and his bonds put in suit. And it shall moreover be the duty of any person in the service of the United States or for any Indian, to take and destroy any ardent spirits or wine found in the Indian country except such as may be introduced therein by the War Department. And in all cases arising under this Act Indians shall be competent witnesses. Approved March 15, 1864."

13 U. S. Statutes at Large, 29.

An Act to prohibit the sale of intoxicating drinks to Indians, providing penalties therefor, and other purposes.

"That any person who shall sell, give away, dispose of, exchange or barter any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication,

to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian a ward of the Government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship, AND ANY PERSON WHO SHALL INTRODUCE, OR ATTEMPT TO INTRODUCE, ANY MALT, SPIRITUOUS, OR VINOUS LIQUOR, INCLUDING BEER, ALE, AND WINE, OR ANY ARDENT OR INTOXICATING LIQUOR OF ANY KIND WHATSOEVER INTO THE INDIAN COUNTRY, WHICH TERM SHALL INCLUDE ANY INDIAN ALLOTMENT WHILE THE TITLE TO THE SAME SHALL BE HELD IN TRUST BY THE GOVERNMENT, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished by imprisonment for not less than sixty days and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense, thereafter: *Provided, however,* That the person convicted shall be committed until fine and costs are paid."

29 Stats., 506.

This last Act of January 30, 1897, provides that the term Indian shall include allottees, and the term Indian country shall include any Indian allotment while the title to the same shall be held in trust by the Government. Aside from these enlargements there is no substantial difference, and the Act of March 15, 1864, which act is entitled an Act to Amend an Act to Regulate Trade and Intercourse with Indians, and to Preserve Peace on the Frontier.

These acts are *in pari materia* and it seems to counsel that, under whichever theory the law may be considered, it does not apply to the conditions of this case. Under the theory of regulating trade and intercourse with Indian tribes it does not apply because the defendant allottee is a citizen of the United States and not subject to such limita-

tion. Under the theory that the Indian ward of the Government should be protected against the liquor traffic we again come to the fact that the defendant allottee is a citizen and not a ward.

The Act of January 30, 1897, it seems to counsel, stands upon one or the other of these theories and can only be sustained upon ground that the Indian is a ward, or the land in question is within the exclusive jurisdiction of the United States. Neither is true in this case.

The Court has said:

> "Now the act of 1897 is not a revenue statute, but plainly a police regulation."
> *In re* Heff, 197 U. S., 505.

This statement was made in considering the sale of liquor to an Indian allottee who was a citizen. It was made after due consideration of the changed conditions of the Indians and that as citizens they were not subject to police regulations within the States concerning the liquor traffic. The theory and purpose of this Act is to protect the Indian ward, and under the authority of the United States to regulate trade and intercourse with the Indian tribes. It is a police regulation which belongs to the jurisdiction of the State of Nebraska, and which State provides a punishment of any illegal traffic in liquor within the territory described as the Omaha Indian Reservation in Thurston County, Nebraska.

The fact that the first part of the Act is declared unconstitutional in its application to citizen Indians brings into consideration what effect it has upon the remaining part thereof. The history of the Act is that the part upon which the defendant was indicted is based upon the same theory, and is an incident to the main purpose of regulating trade with the Indian tribes and protecting the wards of the Gov-

ernment. Being an incident to the main purpose it falls with it. As a police regulation of the liquor traffic it can have no effect within the boundaries of the State of Nebraska.

The principle contended for by the Solicitor-General on former hearing of this case is not denied. The United States has the power as set forth in the cases of McKay vs. Klayton (204 U. S., 458), and United States vs. Rickett (188 U. S., 436), for in those cases the State authorities by legal process were attempting to affect the title which rests in the United States Government. Where such title exists it can only be affected by the courts of the United States, and no action of the State can abridge, limit or affect the title of the United States.

The case of Camfield vs. United States (167 U. S., 518), it seems to counsel, comes nearer an expression of the principle claimed by the Solicitor-General to be involved in this case. The Court, speaking by Justice Brown, said:

> "The General Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case."

Counsel does not deny this right or power of the United States, but claims that it has no application to this case. The defendant is indicted under a law which is based upon the right of the United States to regulate trade and intercourse with Indians and to protect the wards of the Government. This Court has said:

> "In this Republic there is a dual system Government, National and State. Each within its own dominion is supreme, and one of the chief functions of this Court is to preserve the balance between them, pro-

> tecting each in the powers it possesses and preventing any trespass thereon by the other. The general police power is reserved to the States, subject, however, to the limitation that in its exercise the State may not trespass upon the rights and powers vested in the general government. The regulation of the sale of intoxicating liquors is one of the most common and significant exercises of police power. And so far as it is an exercise of the police power it is within the domain of the State jurisdiction. It is true the National Government exacts licenses as a condition of the sale of intoxicating liquors, but it is solely for the purposes of revenue and is not attempted exercise of the police power. A license from the United States does not give the licensee authority to sell liquor in a State whose laws forbid its sale, and neither does a license from a State to sell liquor enable the licensee to sell without paying a tax and obtaining the license required by the Federal Statute. *Now the act of 1897 is not a revenue statute, but plainly a police regulation.*"
>
> *In re* Heff, 197 U. S., 505.

A law which is a police regulation is not the exercise of a proprietary right of property. The law under which the defendant is indicted is not one affecting a trespass upon the land of which the Government is the owner. Neither is the defendant a trespasser upon the land. He is there as the owner of the possession and benefit while the Government holds the title for him. His being there is not adverse to the Government but in accordance with the law granting to the defendant the sole use and benefit and ultimate complete title of the land in question.

In this case the defendant is not one who is or can be charged with having indulged in the liquor traffic. He has kept liquor at his home for the same purposes that many other worthy people keep it. For reasonable use by himself and family and for a social drink with his friends. Counsel admits, however, that if the law prohibiting the

taking of liquor into the Indian country is the exercise of the proprietary right of the United States as an owner of the land, and not a police regulation of the liquor traffic, then the defendant should be held—otherwise not.

The Act of March 15, 1864, and subsequent acts, including the Act of January 30, 1897, are *in pari materia*. Construing them together, we find them to be a police regulation of the liquor traffic.

> "Sec. 43. Where there are earlier acts relating to the same subject, the survey must extend to them; for all are, for the purpose of construction, considered as forming one homogeneous and consistent body of law."
> Endlich on the Interpretation of Statutes.

The exclusion of liquor from the Indian Country was an incident in preventing the traffic with tribal Indians. There is now no such control of traffic with Indians of the class to which defendant belongs, and there is now no reason for the exclusion of liquor consistent with the intention of Congress when this act was passed. The House of Representatives Report No. 1209 shows that the sole purpose of the bill was to prevent the liquor traffic with Indians.

The right of the United States to protect its property by any regulation Congress may see fit to enact is not denied.

There is nowhere shown an intent to violate such a law or right of the United States. The distinction seems to follow the statement of this Court, by Justice Brewer:

> "There is no suggestion in the present case of a violation of an internal revenue law of the nation, but the conviction is sought to be upheld under the Act of 1897, a mere statute of police regulation."
> *In re* Heff, 197 U. S., 507.

As a police regulation the statute of January 30, 1897, is unconstitutional in its application to the defendant.

In this contention counsel for defendant desires to call attention of the Court to the fact that in the three cases before this Court at this term involving the Act of January 30, 1897, each of the plaintiffs in error is an Indian. In the State of Nebraska, ninety-seven per cent of the prosecutions are against Indians. The whites who engage in the liquor traffic, under licenses from the State and Federal Governments, enjoy the profit, and the law intended for the protection of the Indian has become the means of his oppression. The trouble with the Chippewas, of Minnesota, was traced to their prosecution under the liquor law.

To counsel it appears that in the application of the principles of protection to the Indian that he is suffering the greatest wrongs through the means provided for his protection. Not only is he subject to arrest, fines and imprisonment, under a law intended to punish white persons engaged in a debauching liquor traffic, but he is swindled of his property by some of those paid as Government employees to protect him.

The liquor traffic among the Omaha Indians is not as bad as it was some years ago, and it is due to an improvement and development among the Indians themselves.

The Omaha Indians after being citizens for twenty-one years had a Court of Indian Offences established among them. By this means they were deprived of their liberty and property and had their lives threatened. In a high-handed and arbitrary manner they were placed in jail and fined. The so-called Agent was prosecutor, Court, and executioner. This continued until the Federal Court for the District of Nebraska released an Indian by allowing a writ of *habeas corpus*, and declared the Court to be without any legal existence. The money wrongfully taken from these Indians has not been returned to them.

The Indian of to-day hedged about by rules and regulations and an unceasing end of red tape and officialdom is less a man than the old Indian who developed through the necessities of his condition. The protection has grown into burden and ripened into oppression.

It seems to counsel that twenty-three years of citizenship should bring about a position where the Indian ceases to be a special object of the law, and his rights are protected the same as other men's rights. When he shall not be over-protected.

The territory named in the indictment as the Omaha Reservation, in Thurston County, Nebraska, is a part of the Indian country which was ceded to the United States under the treaty of March 16, 1854, 10 Stats., 1043. After the cession to the United States the Omahas, being dissatisfied with the country they had reserved, selected 300,000 acres of land of the ceded country at the place known as the Blackbird Hills, which selection included country described in the indictment, and was approved by the Secretary of the Interior on the 11th day of May, 1855.

At the time the State of Nebraska was admitted into the Union the lands occupied by the Omaha tribe of Indians was not Indian country within the meaning of that term as used in the Indian trade and intercourse Act of June 30, 1834, and as since defined in the following cases: U. S. vs. LeBris, 121 U. S., 278; *Ex parte* Crow Dog, 109 U. S., 566; Bates vs. Clark, 95 U. S., 204.

At no time since the admission of the State of Nebraska has it relinquished to the United States any jurisdiction over the country occupied by the Omaha tribe of Indians.

This claim stands clearly admitted by the Solicitor General in the Government's brief filed when this case was heard by this court at the former hearing, at page 13, in the following language:

"The lands originally occupied by the Omahas, including those in question, were not excluded by any act or treaty from the jurisdiction of the State of Nebraska; consequently, upon its admission they became a part of the territory of the State and embraced within its jurisdiction.

"Langford vs. Monteith, 102 U. S., 145, 147.

"United States vs. McBratney, 104 U. S., 621, 623.

"Fort Leavenworth R. R., Co. vs. Lowe, 114 U. S., 525.

"Utah & Northwestern Railway vs. Fisher, 116 U. S., 28."

With this admission, the Act of January 30, 1897, stands alone in its application to the defendant. In the allotment Act of August 7, 1882, which was a special act in reference to the Omaha Indians, and by which the reservation was allotted and a portion sold the Omahas as a condition depending upon the allotment were made subject to the civil and criminal laws of the State of Nebraska. The Omahas were not then within the jurisdiction of any courts. The jurisdictional part is as follows:

"SEC. 7. That upon the completion of said allotments, and the patenting of the lands to said allottees, each and every member of said tribe of Indians shall have the benefit of, and be subject to, the laws, both civil and criminal, of the State of Nebraska; and said State shall not pass or enforce any law denying any Indian of said tribe the equal protection of the law."

By this Act the Omaha Indians as a tribe were made subject to the laws of the State of Nebraska and they and the territory are thereby subject to the police regulations of the State.

The Solicitor General on the former hearing, while admitting the jurisdiction of the State claims, on page 13 of

brief, the right of the Government to protect its property, stating:

> "But while this is so, it is equally well settled—and the cases cited recognize the fact—that the jurisdiction of the State over the lands of the United States within its limits is subordinate to the jurisdiction of the United States to protect its property and administer its institutions, and cannot be so exercised as to interfere with the constitutional authority of the Federal Government."

This right of the Federal Government is admitted. But it is claimed that the prosecution of a citizen under a police regulation promulgated to control the trade and commerce of Indian tribes is not within the principle growing out of the right to protect property.

In reference to the Omaha tribe of Indians the right of the Federal Government to regulate trade and commerce with tribes of Indians or the individuals thereof has ceased. With it has passed the reason and the right to control such trade and commerce by a police regulation. The reason and right to enforce such regulations has passed, and with the passing of the principle the incidents to aid and support the same have also passed. The right as owner to protect property is not the same as that to protect a people within a prescribed class. The right of the Government to protect property cannot be maintained under a statute enacted for a wholly different purpose.

To counsel for defendant it seems that without some additional legislation extending the jurisdiction of the liquor law or police regulation of January 30, 1897, so as to make it a property qualification that it fails as against this defendant and the Solicitor General admits that there is nothing.

Under these circumstances it is urged that the defendant is not within the statute. The following principle applies:

> "The elementary rule is that penal statutes must be strictly construed, and it is essential that the crime punished must be plainly and unmistakably within the Statute."
> Bellew vs. U. S., 160 U. S., 197.

> "Before a man can be punished, his case must be plainly and unmistakably within the statute."
> U. S. vs. Brewer, 139 U. S., 278.

It is the claim of the defendant that the Act of January 30, 1897, is a police regulation. That it is based wholly upon the individual status of the Indian and in no way a territorial jurisdiction standing by itself alone. The authority for the Act, its history and the decisions applying thereto confirm and establish that fact beyond a reasonable doubt.

The most comprehensive of the earlier acts of Congress in reference to the liquor traffic among Indians is that of June 30, 1834, which is generally known as the Indian Trade and Intercourse Act. Section twenty of this Act was wholly in reference to the liquor traffic with Indians and the introduction of liquor into the Indian country. By another section of the same act the Indian country was designated. The Court has said:

> "Indian country, within the meaning of Section 2139, since the Revised Statutes went into effect. * * * That section is a re-enactment in part of Section 20 of the Act of June 30, 1834, as amended by the Act of March 15, 1864. * * * The re-enacted sections are to be given the same meaning they had in the original statute, unless a contrary intention is plainly manifested."
> U. S. vs. LeBris, 121 U. S., 278.

"Section 2139, as amended and re-enacted in 1892, makes it an offense against the United States for any one to introduce intoxicating liquors into the 'Indian country,' and the offense charged against Dick was the introduction by him of whiskey into that country on the 15th day of March, 1905. * * * If this case depended alone upon the Federal liquor statute forbidding the introduction of intoxicating drinks into the Indian country, we should feel obliged to adjudge that the trial court erred in not directing a verdict for the defendant; for the statute, when enacted, did not intend by the words 'Indian country' to embrace any body of territory in which, at the time, the Indian title had been extinguished, and over which and over the inhabitants of which (as was the case of Culdesac) the jurisdiction of the State, for all purposes of Government, was full and complete."

Dick vs. U. S., No. 62, October term, 1907, page 6.

"But it is contended that although the United States may not punish under the police power the sale of liquor within a State by one citizen to another it has the power to punish such sale if the purchaser is an Indian. And the power to do this traced to that clause of Section 8, Article I, of the Constitution, which empowers Congress 'to regulate commerce with foreign nations, and among the several States, and with Indian tribes.' It is said that the commerce with the Indian tribes includes commerce with the members thereof, and Congress having the power to regulate commerce between the white men and the Indians, continues to retain that power, although it has provided that the Indian shall have the benefit of and be subject to the civil and criminal laws of the State and shall be a citizen of the United States, and therefore a citizen of the State." * * * "We are of the opinion that when the United States grants the privileges of citizenship to an Indian, it gives to him the benefit of and requires him to be subject to the laws, both civil and criminal, of the State; it places him outside the reach of police regulations on the part of Congress."

In re Heff, 197 U. S., 488.

These decisions of this Court show the source of the said Act of January 30, 1897, and the Constitutional provision upon which it stands. It is the status of the Indian, taken either collectively as a tribe or as an individual member of a tribe, that brings him within the law and the Constitutional provision upon which it rests.

The sale of liquor to an Indian, who was a ward of the Government or under the charge of an Indian Agent, has been sustained at distances remote from Indian country. This right to control, by the Federal Government, of traffic prohibited by law with Indians is not limited by any boundary, but is co-extensive with the limits of the United States, and going back to the Constitutional right and authority therefor we find it resting upon the status of Indians as tribes. The exclusion of liquor from the "Indian Territory" was and is an incident to the regulation of trade and intercourse with Indian tribes or the individual members thereof. The defendant as a tribal Indian passed out of existence with issuance to him of a patent in the year 1884, and there then was brought into being a citizen of the United States and the State of Nebraska subject fully, wholly and completely to the jurisdiction of the said State of Nebraska.

With the passing of this status of the defendant, as a tribal Indian, also passed the right of the United States to enforce police regulations against him growing out of and based upon that former status. The defendant CITIZEN is not within the Constitutional provision.

Relying upon the announcement of this Court that the Act of Congress of January 30, 1897, is purely a police regulation, and upon which the question of this case is certified, it is the conviction of counsel that it should be answered in the negative.

Respectfully submitted,

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